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Nos. 96-843 and 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

AT&T FAMILY FEDERAL CREDIT UNION, ET AL.,
PETITIONERS

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL CREDIT UNION ADMINISTRATION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE NATIONAL CREDIT UNION ADMINISTRATION

Respondents have largely abandoned the reasoning of the court of appeals on both issues: their standing to sue under the Federal Credit Union Act (FCUA) and the meaning of the common bond provision of 12 U.S.C. 1759. Instead, they proffer alternative grounds for affirmance that equally lack merit.

First, respondents maintain that this Court's zone-of-interests decisions confer standing on a competitor to challenge any limitation imposed on a regulated industry within the financial services sector so long as the plaintiff competes with the regulated industry and suffers injury by virtue of that competition. This Court's cases, however, have consistently rejected conflating the injury sustained by a competitor with the examination of whether Congress intended the putatively injured party to be within the "zone of interests" of the statutory provision at issue. Next, respondents seek to establish Congress's concern with the competitive injury to banks in its enactment in 1932 of the District of Columbia Credit Union Act, and then impute that legislative concern to Congress's passage two years later of the FCUA. Yet nothing in the language or history of the FCUA supports respondents' assertion that Congress was concerned about the competitive consequences to banks of encouraging credit unions. Rather, Congress intended to enact a law that would provide a means of promoting cooperative credit unions as widely and rapidly as possible—in large part because it believed that actions by banks had contributed to the severity of the Great Depression.

With respect to the merits, respondents maintain that Congress's purpose in enacting the common bond provision was to limit each occupational credit union to all "members" who must "share" a "single" common bond. Resp. Br. 12. They make only the slightest effort to analyze the language of Section 1759 that Congress actually enacted, instead reiterating a textual argument that has

been rejected by every court to consider it. The statutory language, "groups having a common bond of occupation," does not unambiguously foreclose the agency's interpretation that each group may have its own common bond. Respondents seek to draw support for their reading of the common bond provision with a recitation of legislative history from a statute enacted in 1982 that broadened the NCUA's power to merge economically distressed occupational and geographical credit unions. But respondents' depiction of post-FCUA enactment legislative history is both inaccurate on its own terms and irrelevant to whether Congress intended the FCUA to prohibit the NCUA from promulgating its 1982 common bond policy.[1]

1. As we explain in our opening brief (Gov't Br. 17-18), the test for whether the banks have standing to challenge the NCUA's action is whether "their commercial interest was sought to be protected by the [common bond provision]—the specific provision which they alleged had been violated." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1167 (1997). Respondents do not contest that statement of the governing law—indeed, they nowhere articulate (Resp. Br. 15-27) what they believe the appropriate test to be for generally establishing "zone of interests" standing. Instead, they build their standing argument on three faulty

[1] Respondents assert (Resp. Br. 1-2) that the 1982 interpretation was the first time in 50 years that the NCUA or its predecessors had changed its policies with respect to the common bond provision. That assertion is untrue. In our petition for a writ of certiorari (Pet. 6 n.3) and our opening brief (Gov't Br. 7 n.5, 37 n.15), we describe a number of interpretive modifications by the NCUA and its predecessors of the common bond provision, such as allowing family members to join credit unions, permitting a person who joined a credit union to remain a member for life, allowing occupational credit unions to encompass industrial parks and shopping centers, and extending service to low-income groups. Held against the standard respondents set, each of those policies permit occupational credit unions to have multiple common bonds, yet respondents do not challenge those regulations as impermissible under Section 1759.

premises: first, that this Court's zone-of-interests cases stand for the proposition that any competitor who suffers injury has standing to challenge agency action regarding a "limitation[]" imposed by statute in the financial services sector; second, that the common bond provision imposes a "competitive boundar[y]" (*id.* at 20) between credit unions and banks; and third, that Congress was, in fact, concerned about the competitive effect on banks when it enacted the FCUA in 1934.

a. Respondents do not defend the court of appeals' broad "suitable challenger" doctrine, pursuant to which a party "who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Pet. App. 24a. As we explained in our opening brief (Gov't Br. 22-25), that test constitutes an unwarranted expansion of this Court's zone-of-interests decisions because it examines whether a suit brought to challenge agency decisions has an *effect* consistent with the congressional provision rather than whether Congress *intended* the statutory provision at issue to protect the interests of the plaintiff. See, *e.g.*, *Bennett*, 117 S. Ct. at 1167; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Respondents suggest that this Court's decisions involving the financial services sector in effect create a different standard for zone-of-interests standing. They assert that, because the results of some of this Court's standing cases have enabled competitors in certain financial services sectors "to challenge agency action permitting another type of financial institution[] to expand beyond the limitations Congress imposed on it," they, too, should have standing in this case. Resp. Br. 20. That argument, however, has at least two flaws.

First, in all of the cases cited by respondents, the intent of Congress to protect competitors of banks could be inferred from the limitation that had been imposed on

the types of services banks could perform. See, *e.g.*, *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403 (1987) (limits on banks engaging in discount brokerage business); *Investment Co. Inst.* v. *Camp*, 401 U.S. 617 (1971) (limitations on banks performing securities-related functions); *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 155-156 (1970) (limitations on banks providing data processing services). As this Court's subsequent citations to those cases demonstrate, the Court has never abandoned congressional intent as the focal point for determining whether a party falls within the zone of interests of a particular statutory provision. See, *e.g.*, *Lujan*, 497 U.S. at 883 (citing *Clarke*); *Bennett*, 117 S. Ct. at 1161 (citing *Association of Data Processing*). Those cases do not support the proposition that this Court has abandoned a congressional intent analysis in zone-of-interests standing.

Nor do those cases stand for a related assertion advanced by respondents—that a more relaxed zone-of-interests test applies in the financial services sector, such that a competitor may challenge any alleged "loosening" by an agency of any "limitation" on the operations of the regulated entity. See Resp. Br. 16-17. Rather, the plaintiffs in those cases were found to be within the zone of interests protected by the statute because banks were attempting to encroach on functional activities conducted by other financial services groups, and Congress had clearly delineated the boundaries on which functions banks could perform. "Just as the Court found in *Association of Data Processing Service Organizations* and *Arnold Tours*, there is embodied in the antibranching rule of the McFadden Act a congressional purpose to protect competitors of national banks in order *to ensure that national banks remain limited entities*." *Clarke*, 479 U.S. at 416 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). As we explain in more detail below, the common bond provision does not in any way either limit what services a credit union may

provide or constrain how large they can become. The purpose of the common bond provision is to structure credit unions for the benefit of their members by recognizing groups that promote the financial stability of the credit union and its ability to service the credit needs of its members. No interpretation of the common bond provision by the agency would permit credit unions to compete with other financial service providers by offering services (such as data processing, travel, and discount brokerage services) that they are not authorized by statute to provide. Ultimately, respondents' position boils down to a contention that, because the agency's common bond interpretation promotes credit unions that are more economically viable, banks suffer economic injury. But respondents can point to no case from this Court for the principle that a party has standing under the Administrative Procedure Act simply because it suffers competitive injury with the regulated industry. Indeed, they cannot, "for it conflates the zone-of-interests test with injury in fact." *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 524 (1991).

b. The second erroneous assumption underlying respondents' standing argument is their allegation that the common bond was intended as a "competitive boundar[y]" (Resp. Br. 20) between credit unions and banks. As we explained in our opening brief (Gov't Br. 25-26), the court of appeals mistakenly viewed the common bond "limitation[]" as an "entry restriction[]" designed to "limit[] a credit union's customer base." Pet. App. 24a-25a. The common bond provision originated among credit union *proponents*, who perceived it as a means of quickly forming credit unions around strong groups of people already in existence. Thus, from the earliest days of the credit union movement, use of a common bond enabled credit unions to flourish and spread rapidly by making it cheaper to establish a borrower's credit-worthiness and providing a sense of cohesiveness and mutual support among members. See Gov't Br. 4; J. Burns, *Ori-*

gin of the Term Common Bond In Credit Union Usage (1979); A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 6-8 (2d ed. 1992).[2] The legislative history reflects that the common bond provision was not conceived or designed as a competitive boundary to protect banks, but rather as a means of assuring that credit unions would be as strong and economically viable as possible. Experience had demonstrated that the strength of cooperative credit unions was enhanced by such bonds.

Respondents concede that the common bond provision imposes no limit on the number of members a credit union may have (Resp. Br. 20 ("No one contends here that credit unions must be 'small entities.'")), or the number of groups a credit union may have (*id.* at 47 & nn. 32, 33). Indeed, respondents do not argue that the common bond provision imposes any geographical limitation on an occupational credit union's field of membership.

Given those concessions, respondents' explanation for the common bond provision lacks coherence. They assert that the common bond provision is a "limitation on membership," Resp. Br. 16, yet nowhere do they explain *who* is improperly obtaining credit union services under the NCUA's common bond policy. If a credit union can have a large number of members in a large number of groups spread across the country, in theory all of the groups that are being challenged in petitioner AT&T Family Federal Credit Union's field-of-membership who fall outside the putative line drawn by respondents would qualify for some credit union somewhere, even under respondent's definition of a "single common bond."[3]

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[2] Those sources have been lodged with the Clerk. See Gov't Br. 3 n.1. Burns explains that the term "common bond" first appeared in a 1914 primer on how to form credit unions, see J. Burns, *supra*, at 9, and gradually made its way into state credit union laws by the mid-1920s at the behest of credit union proponents, *id.* at 26-27.

[3] Thus, to use respondents' own example, all members of a labor union could form a credit union, wherever the workers happen to be located. See Resp. Br. 47 n.33. The same would be true for all workers who have the same occupation. See *ibid*. If respondents do have standing to challenge field-of-membership determinations and their position is upheld on the merits, the groups that likely will be the least able to form their own economically viable credit unions or to combine with like occupational groups are the small businesses and persons of small means that Congress specifically sought to help with the enactment of the FCUA. See Gov't Br. 5, 40.

That is not to say that such groupings would be economically viable, or that a complete reconfiguration of the credit union industry along the lines apparently contemplated by the banks would not cause severe disruption and economic harm. As we have noted (Pet. 27), nearly 3600 credit unions serving over 32 million people throughout the country have relied on the NCUA's multiple group common bond policy. The chartering of those multiple group credit unions is consistent with the common bond provision's purpose of providing groupings that assure the economic viability of a potential credit union. See Gov't Br. 19. That provision relates exclusively to the composition and governance of credit unions, and its inclusion in the FCUA reflects congressional concern with facilitating the formation and stability of credit unions by providing particular groupings around which credit unions may form. See S. Rep. No. 555, 73d Cong., 2d Sess. 2-3 (1934); 77 Cong. Rec. 3206 (1933) (remarks of Sen. Sheppard).

The FCUA does not guarantee membership in a credit union to all persons who have a common bond; it provides that the regulating agency shall promulgate rules for the membership of credit unions and "determin[e] * * * the economic advisability of establishing the proposed Federal credit union" before approving the organization certificate. 12 U.S.C. 1754. In legislation designed to promote the credit union movement as broadly and quickly as possible, Congress clearly did not intend for banks to be within the zone of interests of the common bond provision to challenge agency decisions about the economic

feasibility of the various groupings of persons who seek to form a credit union.

c. Even if this Court's standing decisions had created a different zone-of-interests test to apply when financial service companies challenge regulatory actions that govern their competitors and even if the common bond provision could somehow be construed as a constraint on credit union operations, as a factual matter respondents cannot demonstrate that Congress viewed banks as "competitors" of credit unions when it enacted the FCUA. The court of appeals was quite emphatic that "Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." Pet. App. 21a.

In the face of that categorical conclusion by the court of appeals, respondents do little more than simply assert that "the competitive interests of banks *were* among Congress's concerns when it enacted the Federal Credit Union Act." Resp. Br. 24. See also Independent Bankers Ass'n Amici Br. (Amici Br.) 16-22. Respondents' "evidence" for that assertion rests primarily on statements in committee hearings about a different bill before a different Congress made by individual members of Congress or representatives of the banking industry. But not only are those statements not part of the legislative history, and so deserving of little if any weight; they also do not in any way show that Congress intended the common bond provision to be a device to limit credit union activities for the protection of banks.

For example, respondents imply that, after bankers spoke about competition from credit unions in hearings on the District of Columbia Credit Union Act of 1932, Congress responded by retaining the common bond provision for occupational credit unions. Resp. Br. 25 (citing *Incorporation of Credit Unions: Hearings on S. 1153 Before the Senate Comm. on the District of Columbia*, 72d Cong., 1st Sess. 25-38 (1932) (*1932 Hearings*)). As an historical matter, however, there was no relation between banks' assertion of competitive concern and Congress's inclusion of the common bond provision. First, all versions of the D.C. bill included the common bond provision—even those proposed before the bankers' testimony.[4] Second, none of the bankers testifying even referred to the common bond provision, much less urged that it be included in the legislation to protect banks' competitive interests.[5]

Respondents also argue that their concerns were "raised and addressed on more than one occasion" (Resp. Br. 26) in the legislative history of the FCUA, but can point to only two places where those interests allegedly were discussed. Those two statements note the banks' general opposition to credit unions, but give no indication that the legislators in question believed the common bond provision should be included in the bill to address the banks' competitive concerns.[6] See also Pet. App. 10a-11a;

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[4] See *Credit Unions and Small Loans: Hearings on S. 4775 and S. 5269 Before the Senate Comm. on the District of Columbia*, 71st Cong., 3d Sess. 3 (1931); *Incorporation of Credit Unions: Hearings on S. 1153 Before the Senate Comm. on the District of Columbia*, 72d Cong., 1st Sess. 3 (1932). As the court of appeals observed, it was only after credit unions flourished that "bankers began to see the common bond requirement as a desirable limitation on credit union expansion." Pet. App. 22a.

[5] See *1932 Hearings*, *supra*, at 25-38. Rather, they objected to the ability of credit unions to accept deposits for their members, to their tax exemption, and to the requirement that credit unions deposit their money in national banks. See *id.* at 25-26. And they objected to the bill on the grounds that it would allow credit unions to compete with banks without being subject to the same laws as banks. *Id.* at 26. But respondents are incorrect to assert that the legislative history of the 1932 D.C. Act evinces any "[c]ongressional concerns that chartering credit unions could inflict an unwanted competitive injury on the commercial banking industry." Resp. Br. 25.

[6] The first, from Senator Goldsborough, takes the form of a question to credit union pioneer, Roy F. Bergengren: "Is there any opposi-

Branch Bank & Trust Co. v. *NCUA*, 786 F.2d 621, 626 (4th Cir. 1986) ("competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited personal means"), cert. denied, 479 U.S. 1063 (1987); S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (Congress intended to establish national system of credit unions as quickly as possible, and viewed credit unions as "capable of rapid mass development").

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tion on the part of commercial banks to the establishment of credit unions?" to which Bergengren replies, "No; I think not. Occasionally here and there they misunderstand, but nothing serious; no." *Credit Unions: Hearings on S. 1639, S. 1640, and S. 1641 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 20 (1933). That statement hardly reflects congressional solicitude for the banks' competitive concerns, particularly since Senator Goldsborough immediately continues, "Is not your primary object to get rid of the small-loan business * * * [a]nd afford an opportunity for the borrower to borrow small sums of money at reasonable and fair rates?" *Ibid.*

The second statement cited by respondents, from Representative Luce, responds to a question whether the bill was intended "to take the place of the crop-production loans." Representative Luce simply replied that "[t]his does not in any way interfere with any of the existing loaning institutions." 78 Cong. Rec. 12,224 (1934) (Rep. Luce). His statement emphasizes his strong support for a healthy national network of credit unions:

> The growth of the unions has been a battle, a long, hard battle. It has been a battle between the men on the one hand who have taken interest in their fellows, and the loan sharks on the other. * * * In order that all parts of the country, including not only the industrial centers but also the agricultural regions, might have the benefit of this system, it was decided to ask from Congress a law that would permit the creation of these credit unions wherever they might be needed. * * * I can imagine no ground for opposition to the bill. It satisfies those who are most concerned in the welfare of this institution.

Ibid. Again, Representative Luce's statement provides no support for respondents' contention that Congress sought to address their competitive concerns by enacting the common bond provision. Nor is there any reason to think that either Senator Goldsborough or Representative Luce was in any way attempting to *limit* the growth of the very institutions that they were working so hard to promote.

Ultimately, respondents appear to admit that, in fact, the congressional intent to address their competitive concerns through the common bond provision is nowhere to be found in the legislative history of the FCUA: "It was not necessary to *debate* these competitive issues in connection with the FCUA in 1934, because they had already been addressed in the 1932 District of Columbia legislation." Resp. Br. 26-27. That assertion, however, rests on the assumptions that (1) Congress actually addressed the banks' competitive concerns through the common bond provision in 1932—which it did not; and (2) nothing happened that would preclude ascribing the intentions of the 72d Congress to the 73d Congress. In fact, however, the Democratic landslide of 1932 and continuing bank failures created a sharply different legislative climate, one in which Congress openly criticized the banking industry for its gross abuses and promptly legislated to promote the "rapid mass development" of credit unions, S. Rep. No. 555, *supra*, at 2-3, as "a happy medium between the loan shark and the bank," at a time when neither could satisfy the normal credit needs of the working class. 78 Cong. Rec. 7259 (1934) (Sen. Barkley).

d. If, as we believe, there is no basis for distinguishing zone-of-interests standing in the financial services sector from other regulated industries, the implications of the special standing test advocated by respondents are striking. Competitors would presumably have standing to challenge an agency's interpretation of a "limitation" that was strictly a self-governing mechanism placed in a statute enacted without any regard given by Congress to the competitive effects on the challenging plaintiff. That is decidedly not the import of this Court's zone-of-interests jurisprudence.

2. With respect to the merits, respondents assert (Resp. Br. 33) that the NCUA's construction of Section 1759 is foreclosed by "[t]he natural reading of this provision." Nonetheless, they do not defend the court of appeals' explanation for why the statute is purportedly

"unambiguous." As we make clear in our opening brief (Gov't Br. 29-33), the court of appeals erred in concluding that the statutory language was unambiguous by finding the words "common bond" redundant with the word "groups" in Section 1759 and comparing the two field-of-membership phrases in Section 1759 ("groups having a common bond of occupation" and "groups within a well-defined neighborhood").

Respondents instead make three different arguments on the merits. They reiterate the grammatical argument they advanced below (which was rejected by the court of appeals), argue that Congress "rejected" the NCUA's common bond interpretation in legislation passed in 1982, and submit legislative history on the ostensible purposes behind the common bond provision. Those contentions are without merit.

a. Like the court below (Pet. App. 10a), respondents are unable to make a textual argument about the plain meaning of the words "[f]ederal credit union membership shall be limited to groups having a common bond of occupation or association" without changing the word "groups" to "members," "having" to "sharing," or inserting the words "single" or "one" before "common bond." See Resp. Br. 2, 6, 12, 13, 14, 33, 37, 38, 43; Amici Br. 14, 15.

Respondents reiterate in this Court their assertion that, because credit union membership is "limited" to groups having "a" common bond of occupation or association, the language of the common bond provision requires the conclusion that members of a credit union must have only "one—unifying 'common bond.'" Resp. Br. 33. Both the court below and the Sixth Circuit in *First City Bank* v. *NCUA*, 111 F.3d 433, 437-438 (1997), petitions for cert. pending, Nos. 96-2018 & 97-100, rejected that syntactical argument as unconvincing. See Gov't Br. 13 n.8, 31. The court of appeals in this case correctly held that "[t]he article 'a' could as easily mean one bond for each group as one bond for all groups in [a federal credit union]." Pet. App. 6a. That is because the article "a" appears in the middle of the participial phrase "having a common bond," which describes the plural noun "groups." See Gov't Br. 30-32. Respondents neither articulate why that syntactical explanation for the phrase's inherent ambiguity is unsound nor offer any contrary view that takes into account the actual words of the statute, arranged in the way Congress actually positioned them.[7]

Confining their textual analysis about the statute's "plain" meaning to three sentences (Resp. Br. 33), respondents devote more of their brief to a contextual argument that essentially goes to the reasonableness of the agency's construction of the phrase "groups having a common bond of occupation." They reiterate the grammatical mistake of the court below and of the Sixth Circuit by maintaining that the phrase "groups having a common bond" is analogous to the adjoining phrase "groups within a well-defined neighborhood, community or rural district." Resp. Br. 37; see also Amici Br. 15-17. But, as we demonstrate in our opening brief (Gov't Br. 31-32), the prepositional phrase "groups within a well-defined neighborhood" has a syntactical clarity that is absent in the participial phrase "groups having a common bond" because the word "within" necessarily limits all constituent groups to a single geographical area, whereas modification of the plural noun "groups" with the parti-

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[7] The Independent Bankers Association attempts to take issue with our grammatical analysis, see Amici Br. 16, but its argument misapprehends the relevant grammatical rule. Our point is not that there is a relevant distinction between a "restrictive" and "non-restrictive" participial phrase in Section 1759, but rather that the use of a singular participial phrase to describe a plural noun does not unambiguously clarify whether all of the groups, or each one individually, must be characterized by the participial phrase that describes them as "having a common bond." As we point out in our opening brief (Gov't Br. 31 n.11), phrases with that construction, such as "groups having a common religion," do not make clear whether each group must have the same religion, or whether all of the groups being so described must have the same religion.

cipial phrase "having a common bond of occupation" does not unambiguously foreclose the possibility that each group can have its own common bond. Thus, the language of the two clauses cannot properly be described as "functionally parallel." See Resp. Br. 37.

To bolster their textual argument, respondents erroneously contend that the test for assessing the ambiguity of statutory language is whether "Congress *intended* to be ambiguous." Resp. Br. 32 (emphasis added). Nothing in *Chevron* or its progeny stands for such a sweeping proposition. Indeed, *Chevron* explicitly rejects such an approach: "[I]t is entirely appropriate for [an agency] to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984). In *Chevron* the Court could not discern the actual intent of Congress in drafting the ambiguous language at issue. *Id.* at 861-862. Because Congress has not directly foreclosed the possibility that the phrase "groups having a common bond of occupation" in Section 1759 means that each group may have its own common bond, this Court should "not substitute its own construction of a statutory provision for a reasonable interpretation made by the" NCUA. *Id.* at 844. See also *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996) ("the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency," even when the agency changes its position).

Nor is the NCUA's construction made unreasonable by respondent's contention that "every employee of every company" could join the same credit union. Resp. Br. 33. First, the common bond provision does not by its terms or purpose constitute the sole limitation on what groups may join a credit union; other provisions of law apply as well. See, *e.g.*, 12 U.S.C. 1754 (general conformity to pro-

visions, general character and fitness to join, and economic viability as determined by the Board), 1785(b) (restrictions on merger or consolidation of existing credit unions). Moreover, there is no reason to think that the NCUA would permit such a monopoly, because to do so would be inconsistent with its goals of "mak[ing] quality credit union service available to all eligible groups who wish to have it" and granting charters to "any group or combination of groups" so long as "its chartering will not materially affect the interests of other credit unions or the credit union system." NCUA, *Chartering and Field of Membership Manual* 1-1 (June 1996). Indeed, given the historical development of the country's 7200 federal credit unions, the purposes behind a system of "cooperative" credit (12 U.S.C. 1752(1)) would be defeated by actual implementation of respondent's *reductio ad absurdum* position.

b. Respondents assert (Resp. Br. 38-43) that light can be shed on the "unambiguity" of the common bond provision by Congress's enactment in 1982 of amendments to the FCUA, which allow for the emergency merger of an insured failing credit union into a healthy credit union "[n]otwithstanding any other provision of law." 12 U.S.C. 1785(h). That argument conveys a greatly mistaken understanding of the language in that statutory provision, the reasons why Congress adopted it, and the legal relevance of that provision in this case.[8]

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[8] Respondents also erroneously contend (Resp. Br. 39-40) that legislative history to a 1977 amendment to the FCUA bears on the meaning of the common bond provision. First, it is axiomatic that the views of a subsequent Congress are irrelevant to discerning the meaning of statutory language enacted by a prior Congress. See, *e.g.*, *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 185 (1994). Second, nothing in the amendment actually enacted by Congress altered the common bond provision in any way. See Pub. L. No. 95-22, § 303(e), 91 Stat. 51, codified at 12 U.S.C. 1757(14). Finally, Congress's failure to overturn the NCUA's 1982 common bond policy despite numerous subsequent amendments to the FCUA is evidence that

First, the NCUA's promulgation of the common bond policy at issue in this case *predated* Congress's enactment of the emergency merger legislation.[9] The NCUA's modification was published in the Federal Register six months before Congress enacted the 1982 FCUA amendments. Not only did Congress do nothing to alter the NCUA's policy, it evidently concluded that the NCUA's policy change did not eliminate the problem Congress sought to address. That problem was not, as respondents

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Congress does not view that policy as unreasonable. See Gov't Br. 43-48.

[9] The timing of the adoption of the NCUA's multiple group policy and the enactment of emergency merger authority support the conclusion that the legislation was necessary even though the NCUA interpreted the common bond provision to permit multiple groups, each with its own common bond, within a single occupational credit union. The NCUA introduced the multiple group policy in April 1982. Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16,775 (1982). Six months after the adoption of that policy, Congress conferred emergency merger authority on the NCUA. Garn-St Germain Depository Institutions Act of 1982, § 131(h), 12 U.S.C. 1785(h) (enacted Oct. 15, 1982). In 1983, Chairman Callahan sent a detailed letter outlining the multiple group policy to Chairman St Germain, the author of the bill that provided temporary emergency merger authority. J.A. 31. Between 1982 and 1987, when the emergency merger authority was made permanent, the NCUA issued several Interpretive Ruling and Policy Statements (IRPS) revising its multiple group policy. See IRPS 82-3, 47 Fed. Reg. 26,808 (1982); IRPS 84-1, 49 Fed. Reg. 46,536 (1984); IRPS 84-1, 49 Fed. Reg. 49,432 (1984). It also conducted a detailed field of membership study. NCUA, *Field of Membership Study* (June 26, 1984). During this period, the American Bankers Association testified before Congress on several occasions and specifically complained of the multiple group policy and the erosion of the common bond. Despite congressional awareness of the NCUA's policy and numerous complaints from the banking industry, Congress never amended the common bond provision. See Gov't Br. 44 n.17. It made the emergency merger provision permanent in 1987, providing broad authority for use in extreme situations. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 509, 101 Stat. 635. The permanent authority does not amend the common bond language found in 12 U.S.C. 1759, but allows the NCUA to merge credit unions without regard to any state or federal law in emergency situations.

argue (Resp. Br. 41-42), a congressional discomfort with credit unions' having multiple occupational common bonds. Rather, the statutory amendments were necessary because the NCUA did not theretofore have the statutory authority to merge a failing occupationally-based credit union into a financially strong community-based credit union, or a failing community credit union into a credit union having a common bond of association. The language in 12 U.S.C. 1785(h) does not provide emergency merger relief "notwithstanding the common bond provision of Section 1759." It says "notwithstanding any other provision of law," and thereby permits such mergers without regard to *any* other limitation imposed by the FCUA. See App., *infra*, 1a.[10] Because the NCUA has never interpreted Section 1759 to authorize a credit union to consist of occupational/associational groups and community-based groups (except for low-income groups, see Gov't Br. 37 n.15), Chairman Connell's statement at the 1981 hearing should be read as consistent with the understanding that, without the emergency merger authority, the NCUA was unable to combine occupational credit unions with associational-or community-based ones without regard to geographic restrictions, other restric-

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[10] Contrary to respondents' assertions, that provision gives the NCUA considerably more discretion to facilitate mergers in emergency situations than if the NCUA were to ignore the common bond provision as construed by respondents. The legislation allows mergers of community credit unions with occupational or associational credit unions and eliminates any requirement for geographic proximity between the merging credit unions. See, *e.g.*, S. Rep. No. 536, 97th Cong., 2d Sess. 8 (1981) (emergency merger relief permits mergers "without any restrictions as to field of membership or geographic area"). It also allows the NCUA to ignore the factors set forth in 12 U.S.C. 1785(c), which normally must be considered in approving mergers. Finally, it eliminates any obstacles to mergers that may be contained in other federal or state laws. The full language of Section 1785(h) is set forth in App., *infra*, 1a.

tions under 12 U.S.C. 1785(c), or other federal or state law.[11]

Because the emergency merger relief enacted by Congress in 1982 did not amend the common bond provision itself, and was enacted after the introduction of the NCUA's multiple group policy, it did not limit the NCUA's discretion to interpret the ambiguities in the provision in accordance with the demands of changing circumstances. See *Smiley*, 116 S. Ct. at 1734. As this Court has explained, "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Chevron*, 467 U.S. at 865. The reasonableness of the NCUA's interpretation is further supported by the numerous instances in which Congress has considered the banks' complaints about the agency's policy but done nothing to overturn it, especially in the many statutory enactments that followed the 1982 emergency merger legislation. See Gov't Br. 43-48. Respondents have

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[11] Respondents quote only from Chairman Connell's informal spoken remarks at the hearing. His written statement on that point read: "While NCUA in no sense would advocate retreating from the longstanding principles of field of membership uniqueness, a relaxation of those requirements in situations involving financially distressed institutions would be an important stabilization tool." *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 112-113 (1981) (*1981 Hearings*). A "field of membership" refers to the membership in a federal credit union, which is characterized by the three organizing principles provided in Section 1759: occupational, associational, or community. See NCUA, *Chartering and Field of Membership Manual* 1-1, 2-7 (June 1996). Moreover, none of the 15 amendments to the FCUA that Chairman Connell proposed in his testimony involve the multiple group common bond issue. See *1981 Hearings*, *supra*, at 117-118. It is, therefore, incorrect of respondents to assert that, in speaking of multiple fields of membership (*e.g.*, community, occupational, and associational), Chairman Connell intended to express any view at that hearing on the issue of multiple common bonds of occupation. See Resp. Br. 40.

nothing to say about that legislative history, but rather attempt to dismiss its legal significance by misstating our position. We do not, as respondents assert, "make[] an extended argument that * * * [Congress] * * * has ratified NCUA's position as a *policy* matter." Resp. Br. 48. Our point is that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." Gov't Br. 47 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985)).

c. Finally, respondents contend that the legislative history supports their view that Congress intended credit unions to be limited to a single common bond. Resp. Br. 43-50. They argue that Congress relied on Roy Bergengren's descriptions of "typical" credit union practice when enacting the FCUA and "intended to authorize only credit unions that adhered to the existing model of 'typical credit unions' as Bergengren described them." *Id.* at 44. First, respondents can cite no evidence that Congress intended to constrain credit unions for all time to what they were "typically" like in the 1930s. Indeed, such an intention would be anomalous in light of Congress's expressed purpose of spreading cooperative credit to as many people as possible. See Gov't Br. 5. Moreover, even assuming Congress intended to rely on Bergengren's vision of what a credit union could be, he himself did not have the limited understanding of a "group" that is ascribed to him by respondents. Bergengren merely testified, for example, that the common bond was a feature of the groups that formed credit unions: "every credit union is organized within a limited and given group of people. And it may have to do only with the members of that group." *1933 Hearings*, *supra*, at 15. But Bergengren himself emphasized that, as an organizing principle, "[t]he group significance is varied." *Id.* at 16. Depending on the need and inclination of prospective members, he observed, credit unions could be organized around "church parishes, * * * factories, in

mills, stores, in public service corporations, in the United States Post Office." *Ibid.*; S. Rep. No. 555, *supra*, at 2 ("employees of a given industry, farmers in a given district, members of a church parish, employees of the United States Government, groups within a well-defined neighborhood, small community or rural district, etc."). A credit union could have thousands of members, or be relatively small; it could consist of the employees of a single corporation, or the employees of many different businesses. See *1933 Hearings*, *supra*, at 16-17, 24. But what Congress understood about the common bond feature was that it provided the cement that held credit union members together and facilitated their "rapid mass development." S. Rep. No. 555, *supra*, at 2.

In numerous ways since the FCUA's enactment in 1934, the NCUA and its predecessors have modified their interpretation of the common bond provision. They have appropriately exercised the discretion afforded by Congress to define what constitutes a common bond and to determine whether the groups that seek to form or join a credit union can be characterized as "having a common bond of occupation." The NCUA's interpretation is consistent with Section 1759's language and purposes. Congress did not, as respondents suggest, intend the common bond provision to fetter the growth and development of federal credit unions.

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For the foregoing reasons, and those stated in our opening brief, the decisions of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

AUGUST 1997

APPENDIX

12 U.S.C. 1785(h) provides as follows:

Emergency merger

Notwithstanding any other provision of law, the Board may authorize a merger or consolidation of an insured credit union which is insolvent or is in danger of insolvency with any other insured credit union or may authorize an insured credit union to purchase any of the assets of, or assume any of the liabilities of, any other insured credit union which is insolvent or in danger of insolvency if the Board is satisfied that—

(1) an emergency requiring expeditious action exists with respect to such other insured credit union;

(2) other alternatives are not reasonably available; and

(3) the public interest would best be served by approval of such merger, consolidation, purchase, or assumption.